IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-793

PEGGIE ANN KING, BARBARA JENKINS, and IRENE COMBS,

Petitioners,

v.

PUBLIC SERVICE EMPLOYEES LOCAL UNION 572 OF THE LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, GEMINI FOOD SERVICES, INC., ERNEST McNEAL, AND SIDNEY C. RAGLAND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioners, Peggie Ann King, Barbara Jenkins, and Irene Combs, respectively pray that a writ of certiorari issue to review the final judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on September 6, 1977.

OPINION BELOW

The opinion of the Court of Appeals affirmed the judgment of the District Court for the Eastern District of Virginia which issued a brief order with opinion granting a motion for judgment on the pleadings. The opinion of the Court of Appeals and the order of the District Court appear in the Appendix hereto.

JURISDICTION

The final judgment of the Court of Appeals was entered on September 6, 1977 and this petition for writ of certiorari is being filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Was the Court of Appeals wrong in affirming a decision of the District Court which held that the Virginia Right-to-Work law is incompatible with federal law?

2. Was the Court of Appeals wrong in affirming the conclusion of the District Court that a state law which prohibits all forms of compulsory unionism does not supplant federal law which permits an employer and a union to negotiate a compulsory unionism clause?

3. Does the federal law positively authorize the states to prohibit on a federal enclave within the states' environs all forms of compulsory unionism?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners asserted below the protection of their rights under §§40.1-58–40.1-69, Code of Virginia Annotated.

They invoked the jurisdiction of the District Court under the Federal Assimilative Crimes Act, 18 U.S.C. §13, the Declaratory Judgment Act, 28 U.S.C. §2201, and 28 U.S.C. §1331.

Petitioners claimed that they were subject to injury and damages by the respondents for the violation of §§40.1-58–40.1-68, Code of Virginia Annotated, by virtue of the authority given the states under §§8(a)(3) and 14(b) of the National Labor Relations Act, 29 U.S.C. §§158(a)(3) and 164(b) respectively.

STATEMENT OF THE CASE

Petitioner King was an employee of Gemini Food Services, Inc. and its predecessor when Gemini and Public Service Employees Local Union 572 of the Laborers International Union of North America, AFL-CIO, entered into a collective bargaining agreement under which all employees were required to join the Union within thirty (30) days as a condition of employment. Petitioner King steadfastly refused to join the Union and was thus discharged by her employer. Petitioners Jenkins and Combs were employed by Gemini and involuntarily acquiesced to the demands to join the Union in order to keep their jobs.

Defendant Sidney Ragland is the president and manager of Gemini Food Services, Inc. and Defendant Ernest McNeal was the owner and manager of the Company's predecessor, Multi-Mack, Inc.

Gemini provides cleaning services for the kitchen at Fort Monroe, Virginia, a federal enclave. Pursuant to an agreement arranged by Ernest McNeal and negotiated and honored by and between Gemini, Sidney Ragland and the Union, employees of Gemini must make application to join the Union within thirty (30) days of employment at the Company and must maintain their membership in good standing in the Union as a condition of continued employment.

REASONS FOR GRANTING THE WRIT

1. The Decision Below is in Conflict with the Controlling Decisions of this Court.

The Court of Appeals for the Fourth Circuit, in the case at bar, has retreated from the position that it previously took when it held that the "grant of exclusive jurisdiction . . . to the federal government . . . does not exclude all state jurisdiction relating to the federal area." *Bartsch v. Washington Metropolitan Area Transit Commission*, 357 F.2d 923, 924 (4th Cir. 1966). The decision below is also in conflict with the principles set forth by this Court in *Hancock v. Train*, 426 U.S. 167, 179 (1976) when this Court said "[n]either the Supremacy Clause nor the Plenary Powers Clause bars all state regulation which may touch the activities of the Federal Government."

Congress has specifically provided for the applicability of state laws on federal enclaves. These permissible state laws have been in the nature of a public policy-regulatory law, e.g., 10 U.S.C. §2671 which provides that all hunting, fishing, and trapping on the enclaves be in accordance with state law, and 4 U.S.C. §§105-106, under which persons on federal enclaves are not relieved from the payment of sales and income taxes of the surrounding state. The most notable such Congressional enactment, however, is the Assimilative Crimes Act, which, in effect, adopts the entire criminal code of a state where that code is not inconsistent with federal policy. The Act applies in the situation where Congress can be relieved of day to day regulation and where the regulation is of private conduct and imposes no prohibitions on the national government or its offices. *Penn Dairies, Inc. v. Milk Control Commission*, 318 U.S. 261 (1943).[1]

Thus, if the administering of state laws will "interfere with the carrying out of a national purpose . . . [or w]here enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way." (citations omitted) *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 103-04 (1940). There must, therefore, be a serious

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[1] "[T]hose who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions . . . and the mere fact that nondiscriminatory . . . regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state . . . regulation." (citations omitted) 318 U.S. at 269.

interference or burden on the federal government before the state law will give way.[2]

The law in question, the Virginia Right-to-Work law, "imposes no prohibitions on a national government or its officers"; and it in no way handicaps "efforts to carry out the plans of the United States." Instead, it only applies to those who "contract or furnish supplies or render services to the government," and are without any governmental immunity. Furthermore, Congress has ordained any "burden" that the Right-to-Work law may impose by virtue of §14(b) of the Taft-Hartley Act, 29 U.S.C. §164(b), and the Assimilative Crimes Act.

If state regulation of an activity is applied to a federal enclave "when and to the extent there is 'a clear congressional mandate'" that would make the authorization of state regulations clear and unambiguous. *Hancock*, 426 U.S. at 179. Clearly, if the Assimilative Crimes Act is read together with §14(b) of the

[2] This Court has held that some burdens: "save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system. . . .

* * * *

"Furthermore, we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden." *Penn Dairies*, 318 U.S. at 271, 275. See also Alabama v. King & Boozer, 314 U.S. 1 (1941), and *James Stewart, supra.*

Taft-Hartley Act, it is apparent that there is a Congressional mandate that makes the authorization and application of Virginia's Right-to-Work law to Fort Monroe "clear and unambiguous."

2. The Decision Below Conflicts with the Uniformity Principle As Set Forth by this Court.

Both Congress and the courts have consistently made clear that, where constitutionally possible, uniformity between the surrounding states and the federal enclave is favored. In *First Hardin National Bank v. Fort Knox National Bank*, 361 F.2d 276, 279 (6th Cir.), *cert. denied*, 385 U.S. 959 (1966), the Court of Appeals said:

> [A federal enclave] within a state remains a geographical part of the city, county and state of which it was part at the time of acquisition by the United States. . . .
>
> The geographical structure of the State . . . not only remains the same, but the State retains a dormant jurisdiction over the land. (footnote omitted)
>
> * * * *
>
> The State . . . merely relinquished its political control over the area so long as the property is owned by the United States Government, but did not relinquish its geographical boundaries.

In 1970, this Court extended this principle when it found that persons residing on federal enclaves "clearly live[d] within the geographical boundaries of the State" from which it was acquired and are, therefore, residents

of that state – at least to the extent of being able to vote in state elections. *Evans v. Cornman,* 398 U.S. 419, 421-22 (1970).

Where Congress has not legislated otherwise, the judicial assimilation of the laws of the federal enclave with the laws of the surrounding state, "assures that no area however small will be left without a developed legal system for private rights." *James Stewart,* 309 U.S. at 100. This desire for uniformity between the federal and surrounding state territory has led to a series of Congressional acts which have adopted the state cause of action for accidental death by negligence or wrongful death, 16 U.S.C. §457, the State Workmen's Compensation Act, 40 U.S.C. §§105-110, and, as already set forth, the state criminal laws, i.e., the Assimilative Crimes Act. We urge also that Congress has shown the same inclination toward uniformity by enacting §14(b) of the Taft-Hartley Act whereby a state may prohibit compulsory unionism in any form. To assimilate the state law on the enclave would, in effect, give the state power to carry out its public policy of insuring private rights *everywhere* within the state and not just in those areas over which the federal government would have no jurisdiction. Mr. Justice Frankfurther, in a dissenting opinion in *Pacific Coast Dairy, Inc. v. Department of Agriculture,* 318 U.S. 285, 299-300 (1943) characterized this principle of uniformity as a lessening of exclusive jurisdiction of the federal government, when he said:

> The so-called exclusive jurisdiction drawn from the grant to Congress of power to legislate exclusively has, as a matter of historical fact, become increasingly less and less exclusive. . . .

> And while lip service is paid to the doctrine of 'exclusive jurisdiction' by professing to absorb for federal enclaves those laws of the state which were enforced there prior to its cession, the liberality with which state social measures are deemed not to impinge upon the national purposes for which the enclave was established, is a recognition in fact that the Constitution permits sensible adjustments between state and federal authority although activities subject to legal control take place on federal territory within a state. (citation omitted)

Dissenting in the same case, Mr. Justice Murphy reaffirmed this principle of applying state power to the federal enclave.[3] This Court, ten years after *Pacific*

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[3] ". . . Congress is given the power 'to exercise exclusive legislation' over federal areas . . . but that does not necessarily mean that the States, no matter what their interest or need, are absolutely without power to enact legislation, not inconsistent with Congressional policy or Constitutional dictates, which will apply in some measure to those areas which are within their boundaries.

"We derive much of our strength as a nation from our dual system of federal government. To promote the harmonious working of that system the general clauses of the Constitution which broadly delineate the boundaries of state and national power should be construed by appraising the respective state and national interests involved and striking a balance which gives appropriate recognition to the legitimate concerns of each government. . . . If a state is acting in matters normally within its competence, with which it is especially equipped to deal, to achieve important governmental ends such as the protection of the public health and welfare or the maintenance of orderly marketing conditions, the effects of its action should be allowed to extend into federal areas within its boundaries unless inconsistent with an act of Congress or the provisions or necessary implications of the Constitution. This formula allows

(continued)

Coast Dairy, adopted the uniformity principle, as earlier expressed by Justices Frankfurter and Murphy, as the law of the land, when it said in *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624, 627 (1953):

> The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.

Thus, where the public policy of the state is to prohibit an activity such as compulsory unionism, as is the case in the State of Virginia, it would truly be a "thorn in the side" of that state to have a territory within its boundaries where such activity would be permitted and where its public policy would be thwarted. To permit compulsory unionism within the federal enclave in Virginia would create the "fiction of a state within a state" and would thus be counter to the opinion of this Court in *Howard*.

(footnote continued from preceding page)
the States to carry out important programs which must be of statewide application to be effective and adequately recognizes the paramount character of federal power. . . .

". . . So long as there is no overriding national purpose to be served, nothing is gained by making federal enclaves thorns in the side of the States and barriers to the effective statewide performance of those functions." 318 U.S. at 303-05.

3. Contrary to the Decision Below, the Principle of Uniformity, through the Assimilative Crimes Act, is Controlling in this Case.

Conformity with state law was what the Court of Appeals was concerned with in *Wallach v. Lieberman*, 366 F.2d 254, 256 (2d Cir. 1966) when it said:

> [T]he constitution requires national uniformity in the admiralty jurisdiction; however, with respect to certain crimes in federal enclaves, instead of any such constitutional mandate, there is an express Congressional policy of promoting conformity with state law. . . . (citations omitted)

The Assimilative Crimes Act is the most persuasive evidence of the principle of uniformity.

In 1911, this Court, in analyzing a forerunner of the present Assimilative Crimes Act, declared in *United States v. Press Publishing Co.*, 219 U.S. 1, 9-10 (1911):

> [I]t becomes manifest that Congress, in adopting it, sedulously considered the twofold character of our constitutional government, and had in view the enlightened purpose, so far as the punishment of crime was concerned, to interfere as little as might be with the authority of the states on that subject over all territory situated within their exterior boundaries, and which hence would be subject to exclusive state jurisdiction but for the existence of a United States reservation. In accomplishing these purposes it is apparent that the statute, instead of fixing by its own terms the punishment for crimes committed on such reservations which were not previously provided for by a law of the United States, adopted and wrote in the state law, with the single difference that the offense . . . [would be] punished as an offense against the United States . . .

In upholding the constitutionality of the present Assimilative Crimes Act against allegations that it was an unconstitutional delegation to the state of Congress' legislative authority, this Court reaffirmed the principle of *Press Publishing* in the case of *United States v. Sharpnack*, 355 U.S. 286, 291-93 (1958):

> The above . . . demonstrates a consistent congressional purpose to apply the principle of conformity to state criminal laws in punishing most minor offenses committed within federal enclaves. . . .
>
> Recognizing its underlying policy of 123 years' standing, Congress has thus at last provided that within each federal enclave, to the extent that offenses are not preempted by congressional enactments, there shall be complete current conformity with the criminal laws of the respective States in which the enclaves are situated.
>
> The basic legislative decision made by Congress is its decision to conform the laws in the enclaves to the local laws as to all offenses not punishable by any enactment of Congress.

Where an offense is expressly prohibited and punished as a crime by a law of the United States, that law is dominant and controlling on the federal enclave and the Assimilative Crimes Act would not apply. *Williams v. United States*, 327 U.S. 711, 717 (1946). But, when the federal criminal law has not defined a certain offense or provided for its punishment, and the offense would be punishable in the state where the enclave is located, the Assimilative Crimes Act constitutes an adoption by Congress of state criminal law for that federal enclave. *United States v. Anderson*, 425 F.2d 330, 332 (7th Cir. 1970); *United States v. Warne*,

190 F. Supp. 645, 658 (N.D. Cal. 1960), *modified*, 371 U.S. 245 (1963).

Federal law is silent on the question of membership in or the payment of dues to a labor union as a condition of continued employment. However, because the State of Virginia has legislated that such a denial of the Right-to-Work is a criminal offense (Code of Va. Ann. §40.1-69), these sanctions are assimilated onto Fort Monroe by virtue of the Assimilative Crimes Act. Th provisions of the state criminal statute then become the requirements of federal law and prevail on the federal enclave and continue in force until the adoption of a federal statute or regulation expressing a different policy. *Nash v. Air Terminal Services, Inc.*, 85 F. Supp. 545, 548 (E.D. Va. 1949).[4]

Hence, it follows that absent any federal legislative enactments expressed by Congress on the subject of compulsory unionism, the state law is the federal law.

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[4] In *Nash*, the District Court held that Virginia's segregation law, by virtue of the Assimilative Crimes Act, was the federal law prevailing at National Airport because on the date of the events pleaded, there was no contrary federal policy on the question of integration. However, the same court, in Air Terminal Services, Inc. v. Rentzel, 81 F. Supp. 611 (E.D. Va. 1949), held that Virginia's segregation law no longer applied to National Airport after December 27, 1948, the date on which the administrator of civil aeronautics promulgated a regulation mandating the avoidance of racial distinctions in federal matters. That court held that while the Assimilative Crimes Act "was intended 'to use local statutes to fill in gaps in the Federal Criminal Code' . . . [i]t is not to be allowed to override other 'federal policies as expressed by Acts of Congress' or by valid administrative orders. . . ." (citations omitted) 81 F. Supp. at 612.

4. The Decision Below Conflicts with this Court's Decision in *Mobil Oil* and its Application of §14(b) of the National Labor Relations Act, As Amended.

The main issue in the case at bar is whether §14(b) of the National Labor Relations Act permits the application of the Virginia Right-to-Work law to the union shop provision in the collective bargaining agreement between the Union and the Employer. There is no question that such a provision would be illegal and contrary to state law if it were contained in a collective bargaining agreement covering employees outside of the federal enclave, or even if it covered employees who were federal employees covered under Executive Order 11491; but the employees in question here work on a federal enclave for a private employer, that federal enclave being completely within the environs of the State of Virginia.

In *Oil, Chemical & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407 (1976), this Court addressed itself to the job situs as the principal determinant of the applicability of a state Right-to-Work law. In that case, the place of employment was "on the high seas – outside the territorial bounds of the State." 426 U.S. at 413. However, in the case at bar, the place of employment is completely within the territorial bounds of the State of Virginia. In that case, this Court said:

> We hold that under §14(b), right-to-work laws cannot void agreements permitted by §8(a)(3) when the situs at which all the employees covered by the agreement perform most of their work is located outside of a State having such laws. 426 U.S. at 414.

Thus, because Fort Monroe is within the bounds of the State of Virginia, the *Mobil Oil* test has been met and the Virginia law would apply under the uniformity principle.

As Mr. Justice Stewart stated in his dissenting opinion in *Mobil Oil*:

> §§8(a)(3) and 14(b) together exhaust the federal interest in the types of union-security agreements employers and unions may make. The closed shop is absolutely prohibited. And any lesser security arrangement, though consistent with the federal interest, is sanctioned only if it harmonizes with state policy. 426 U.S. at 427.

Mr. Justice Stewart went on to say:

> The specific legislative history of §14(b) is of no greater aid in resolving the dilemma. Congress simply did not address the choice of law problems that would inevitably arise in multistate work force situations. We are, however, not entirely without signposts. When Congress legislated with respect to union-security agreements in 1947, it did not write on a clean slate, for few issues in American labor history had been as controverted as the moral legitimacy and, indeed, the legality, of union security agreements. It is unnecessary for the purpose of this case to review the history of that long controversy. It is sufficient only to realize that Congress did not resolve it, but instead left each individual State free to outlaw union security agreements in the interest of a perceived policy of keeping industrial relations more individualistic, open, and free. (footnotes omitted) 426 U.S. at 429-30.

The State of Virginia has an interest in, and must be permitted to legitimately assert that interest in, the hiring process as well as the conditions of employment

that are negotiated between an employer and a union covering employees who work within the boundaries of the State. This rule Congress has specifically legislated.

Thus, whether one uses the *Mobil Oil* test of Justices Stewart and Rehnquist in their dissenting opinion, or the test of Justice Marshall in the majority opinion, one can reach only one conclusion: that the Virginia Right-to-Work law, a law prohibiting all forms of compulsory unionism, is applicable to any employee working within the boundaries of the State of Virginia.

5. The Decision Below Clearly Conflicts with this Court's Decision Regarding Federal Labor Law.

The only reason for excluding state law from federal enclaves, under the Assimilative Crimes Act, is the conflict with federal law which is non-existent in this case. In fact, not only is there lack of a conflict with federal law, but there is a positive authorization of the state law by the federal law.

The Court below appeared to assume that there is a federal policy in favor of union security agreements. In view of the decision of this Court in *Mobil Oil*, such an assumption is clearly erroneous because this Court there said:

> Federal policy favors permitting such agreements *unless* a State or Territory with a sufficient interest in the relationship expresses a contrary policy via right-to-work laws. (emphasis added) 426 U.S. at 420.

The proviso to §8(a)(3) of the Taft-Hartley Act was never intended to provide affirmative legal protection

to union security agreements and, in fact, merely sets forth a policy that such agreements will not be considered to be illegal under federal law. Implicit in §8(a)(3), as construed by this Court in *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board,* 336 U.S. 301 (1949), as well as in §14(b), is the federal policy that the states are permitted and given the explicit power to prohibit any form of compulsory unionism agreements within their boundaries.

If any conflict existed between permitting and prohibiting union security agreements, it was resolved by Congress in favor of allowing the states the power to prohibit such agreements through the operation of §14(b) of the National Labor Relations Act, as amended and the Assimilative Crimes Act; and to limit the states' exercise of the power to prohibit such agreements would conflict with federal policy. Thus, District Judge Kellam's opinion that federal policy would conflict with the exercise of state prohibitions on compulsory unionism on the federal enclave, an opinion which was upheld by the Court of Appeals for the Fourth Circuit, is clearly erroneous.

The historical background of §8(a)(3) of the National Labor Relations Act clearly shows that federal labor policy does not now and has not ever favored a so-called "union security" agreement, i.e., an agency shop or union shop clause. When the language now contained in §8(a)(3) of the Act was first adopted in a similar form in §8(3) of the Wagner Act in 1933, the first federal labor relations act, it was enacted to make it perfectly clear that, as a matter of federal policy, a union security agreement would not violate the federal

law. However, there was not then any express policy favoring such an agreement. There were Right-to-Work laws in existence before the passage of the present National Labor Relations Act, the specific provisions for them appearing in §14(b).

In *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, supra,* this Court outlined the law with respect to union security agreements.[5] This Court quoted extensively from the legislative history of the Wagner Act, the predecessor of the present National Labor Relations Act, and referred to the Senate Report which indicated that it was not the intent of Congress to interfere with the laws of the states on the subject of union security agreements. This Court, in *Algoma,* went on to state:

> Since we would be wholly unjustified, therefore, in rejecting the legislative interpretation of §8(3) placed upon it at the time of its enactment, *it is not even necessary to invoke the principle that in cases of concurrent power over commerce State law remains effective so long as Congress has not manifested an unambigious purpose that it should be supplanted.* (emphasis added) 336 U.S. at 312.

Hence, one must conclude that there is no federal policy favoring so-called "union security" agreements

[5] "It is argued, therefore, that a State cannot forbid what §8(3) affirmatively permits. The short answer is that §8(3) *merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement.* This is the obvious inference to be drawn from the choice of the words 'nothing in this Act . . . or in any other statute of the United States,' and it is confirmed by the legislative history." (emphasis added) 336 U.S. at 307.

over state prohibitions on compulsory unionism. In fact, as this Court stated in *Algoma,* there is only the language of disclaimer reflecting a federal policy of *non-interference,* and on the question of compulsory unionism agreements, the last word is left to the state civilly as well as criminally. It would then follow that the Assimilative Crimes Act would make the enforcement of a union security agreement, whether it be union shop or agency shop, illegal on a federal enclave situated within a jurisdiction which prohibits such an agreement by criminal statute, under the authority vested in the state to institute such a prohibition under §§8(a)(3) and 14(b) of the Act.

There is no rigid Congressional mandate favoring any form of compulsory unionism. In fact §14(b) manifests a Congressional intent to grant priority to state policy on compulsory unionism. By the combined authority of §14(b) and the Assimilative Crimes Act, the Virginia Right-to-Work Law is controlling in any federal enclave within the territorial units of Virginia. It then follows as a matter of course that a collective bargaining agreement authorizing a union shop on a federal enclave within the boundaries of the State of Virginia would be clearly in violation of federal labor policy because the state prohibition is fully authorized by Congressional enactments. State law then, on this question, is supreme. *Retail Clerks, Local 1625 v. Schermerhorn,* 373 U.S. 746, *reargued,* 375 U.S. 96 (1963).

6. The Decision Below is Wrong in Stating that Ban on Compulsory Unionism is in Conflict with the Proviso to §8(a)(3) on the Federal Enclave.

Section 8(a)(3) of the Act contains, in pertinent part, the following language:

> *Provided,* That nothing in this subchapter, or any in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day. . . .

The legislative history of the original Wagner Act makes the Congressional intent with respect to this proviso quite clear. A Senate report on a draft of what is now the 8(a)(3) proviso contained in 1 *Legislative History of the National Labor Relations Act 1935 (GPO 1949)*, at 1353, says:

> The proviso does not make [union shop] agreements legal; it merely says that nothing herein should illegalize them. The operation of State common law on the subject is left unaffected.

In Volume 2 of the same *History,* at 2311, another Senate Report contains the following:

> [T]he proviso in question states that nothing in this bill, or in any other law of the United States, or in any code or agreement approved or prescribed thereunder, shall be held to prevent the making of [union shop] agreements between employers and employees. In other words, the bill does nothing to facilitate [union shop] agreements to or make them legal in any State where they may be illegal; it does not interfere with the *status quo* on this debatable subject but leaves the way

> open to such agreements as might now legally be consummated . . .

Again, at 2394 of the *History,* Senator Wagner himself made the following response to a remark by Senator Hastings:

> [T]he Senator apparently does not understand that provision. It does no more than to legalize a [union shop] agreement, which is a matter of agreement between employer and employees where it is now sustained by the public opinion of the State.

It thus follows that Congress, in formulating and enacting what is now the 8(a)(3) proviso of the National Labor Relations Act, the predecessor of which was §8(3) of the Wagner Act, intended only to permit the union shop and nothing more. No federal policy favoring the union shop, or any other form of compulsory unionism for that matter, was intended. Clearly Congress did not adopt the union shop as an integral part of federal labor policy and certainly it did not prohibit the application of a state Right-to-Work law to a federal enclave under the Assimilative Crimes Act. In fact, Congress' sole intent was to permit the union shop only in those states where public policy approved of such an arrangement. The State of Virginia is clearly not one of those states because it has passed civil and criminal sanctions prohibiting all forms of compulsory unionism and has even stated that such prohibitions are a matter of public policy of the State.

Violation of any section of the Virginia Right-to-Work law constitutes a misdemeanor under §40.1-69 of the Code of Virginia Annotated. It follows that the Right-to-Work law is incorporated by the federal

Assimilative Crimes Act into the law applicable to federal enclaves located within the boundaries of the State of Virginia, and in this case, Fort Monroe.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

Principal Statutory Provisions Involved.

Jurisdictional Statutes:

Review by Certiorari of Decisions of Courts of Appeals.

1. 28 U.S.C. §1254(1):

> "Case in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Jurisdiction of District Courts.

2. 18 U.S.C. §13, Federal Assimilative Crimes Act:

> "Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."

3. 28 U.S.C. §2201, Declaratory Judgment Act:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further

relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

4. 28 U.S.C. §1331:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Provisions of the National Labor Relations Act:

1. Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3):

"(a) It shall be an unfair labor practice for an employer –

* * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in

section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

2. Section 14(b) of the National Labor Relations Act, 29 U.S.C. §164(b):

"(b) Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

Provisions of the Virginia Right to Work law:

Code of Va. Ann. §§40.1-58 - 40.1-69:

1. "§40.1-58. Policy of article. – It is hereby declared to be the public policy of Virginia that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization.

2. "§40.1-58.1. Application of article to public employers and employees. – As used in this article, the words, "person," "persons," "employer," "employees," "union," "labor union," "association," "organization," and "corporation" shall include but not be limited to public employers, public employees and any representative of public employees in this State. The application of this article to public employers, public employees and their representatives shall not be construed as modifying in any way the application of §40.1-55 to government employees.

3. "§40.1-59. Agreements or combinations declared unlawful. – Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for the employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against public policy and an illegal combination or conspiracy.

4. "§40.1-60. Employers not to require employees to become or remain members of union. – No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer.

5. "§40.1-61. Employers not to require abstention from membership in union. – No person shall be required by an employer to abstain or refrain from membership in any labor union or

labor organization as a condition of employment or continuation of employment.

6. "§40.1-62. Employer not to require payment of union dues, etc. – No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization.

7. "§40.1-63. Recovery by individual unlawfully denied employment. – Any person who may be denied employment or be deprived of continuation of his employment in violation of §§40.1-60, 40.1-61 or 40.1-62 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation or association acting in concert with him by appropriate action in the courts of this Commonwealth such damages as he may have sustained by reason of such denial or deprivation of employment.

8. "§40.1-64. Application of article to contracts. – The provisions of this article shall not apply to any lawful contract in force on April thirty, nineteen hundred forty-seven, but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of an existing contract.

9. "§40.1-65. Agreement or practice designed to cause employer to violate article declared illegal. – Any agreement, understanding or practice which is designated to cause or require any employer, whether or not a party thereto, to violate any provision of this article is hereby declared to be an illegal agreement, understanding or practice and contrary to public policy.

10. "§40.1-66. Conduct causing violation of article illegal; peaceful solicitation to join union.

– Any person, firm, association, corporation, or labor union or organization engaged in lockouts, layoffs, boycotts, picketing, work stoppages or other conduct, a purpose of which is to cause, force, persuade or induce any other person, firm, association, corporation or labor union or organization to violate any provision of this article shall be guilty of illegal conduct contrary to public policy; provided that nothing herein contained shall be construed to prevent or make illegal the peaceful and orderly solicitation and persuasion by union members of others to join a union, unaccompanied by any intimidation, use of force, threat of use of force, reprisal or threat of reprisal, and provided that no such solicitation or persuasion shall be conducted so as to interfere with, or interrupt the work of any employee during working hours.

11. "§40.1-67. Injunctive relief against violation; recovery of damages. – Any employer, person, firm, association, corporation, labor union or organization injured as a result of any violation or threatened violation of any provision of this article or threatened with any such violation shall be entitled to injunctive relief against any and all violators or persons threatening violation, and also to recover from such violator or violators, or person or persons, any and all damages of any character cognizable at common law resulting from such violations or threatened violations. Such remedies shall be independent of and in addition to the penalties and remedies prescribed in other provisions of this article.

12. "§40.1-68. Service of process on clerk of State Corporation Commission as attorney for union. – Any labor union or labor organization doing business in this State, all of whose officers and trustees are nonresidents of this State, shall

be written power of attorney, filed with the Department of Labor and Industry and the State Corporation Commission, appoint the clerk of the State Corporation Commission its attorney or agent upon whom all legal process against the union or organization may be served, and who shall be authorized to enter an appearance on its behalf. The manner of service of process on the clerk of the State Corporation Commission, the mailing thereof to the labor union or organization, the fees therefor, the effect of judgments, decrees and orders, and the procedure in cases where no power of attorney is filed as required, shall be the same as provided for in cases of foreign corporations.

13. "§40.1-69. Violation a misdemeanor. – Any violation of any of the provisions of this article by any person, firm, association, corporation, or labor union or organization shall be a misdemeanor."

Opinion of the United States Court of Appeals for the Fourth Circuit

United States Court of Appeals, Fourth Circuit, No. 77-1064.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News (D.C. No. 76-37-NN). Argued June 9, 1977, decided September 6, 1977.

Before WINTER, BUTZNER and WIDENER, Circuit Judges.

PER CURIAM:

Peggie Ann King, Barbara Jenkins, and Irene Combs appeal the district court's denial of declaratory and injunctive relief, as well as monetary damages. Their major contention is that for purposes of an employment contract on a federal enclave, the Virginia Right to Work Law [Va. Code §40.1-58 *et seq.*] is assimilated into federal law by the Assimilated Crimes Act [18 U.S.C. §13].

The district court concluded that the Virginia law is not incorporated into federal law. For the reasons sufficiently stated in its opinion, we affirm. *See* King v. Gemini Food Services, 93 LRRM 2921 (E. D. Va. Nov. 1, 1976).

Memorandum Opinion of the United States District Court for the Eastern District of Virginia Newport News Division

United States District Court for the Eastern District of Virginia, Newport News Division, No. 76-37-NN. Decided November 1, 1976.

KELLAM, Chief Judge.

This suit arises from a labor dispute concerning the legality of a union shop agreement for a business operating on a federal enclave situated within Virginia. Jurisdiction is claimed on the basis of the existance of a federal question and an amount in controversy in excess of $10,000 exclusive of costs and interest. 28 U.S.C. §1331. Plaintiff seeks declaratory and injunctive relief

plus money damages. This case now comes up for consideration on motions for judgment on the pleadings. Fed. R. Civ. P. 12(c).

Plaintiffs Johnson, Jenkins, and Combs are employees of Defendant Gemini Food Services, Inc. (hereinafter Gemini). Plaintiff King was employed by Gemini before being discharged, allegedly, for failure to join Defendant Public Service Employees Local Union 572 of the Laborers International Union of North America, AFL-CIO (hereinafter Union). Defendant McNeal was the owner and manager of Gemini's predecessor company, Multi-Mack, Inc. Defendant Ragland is the president and manager of Gemini. The union shop agreement in question was arranged and honored by McNeal, Ragland and Union.

Gemini is engaged in the business of supplying certain food services on the federal enclave of Fort Monroe, Virginia. Pursuant to agreement between Gemini and Union, employees of Gemini must make application to join Union within 30 days of their becoming employed by Gemini and must maintain membership in good standing in Union as a condition of continued employment. Failure to join Union or failure to maintain good standing in Union are grounds for dismissal.

Plaintiffs attack the union shop agreement on three grounds. The first is that by virtue of the criminal sanction of Virginia's Right to Work law (Va. Code Ann. §40.1-58 et seq.), the civil and regulatory provisions of Virginia's Right to Work law are assimilated into federal law by the federal Assimilative Crimes Act (18 U.S.C. §13), making union shop agreements violative of federal law. Plaintiffs' second

claim is that the union shop agreement is unconstitutional because the compulsory paying of dues is a deprivation of property without due process of law and the required association with the union is a deprivation of Plaintiffs' freedom of association. Thirdly, Plaintiffs have suggested that the union shop agreement violates the standards set forth in sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. §§158(a)(3), (b)(2).

Defendants in the case at bar have moved for a judgment on the pleadings. Plaintiffs have moved for a partial summary judgment. The test applicable for a judgment on the pleadings or a summary judgment is whether or not, when viewed in the light most favorable to the party against whom the motion is made, no genuine issues of material fact remain and the case can be decided as a matter of law. Fed. R. Civ. P. 12(c); C. Wright & A. Miller, Federal Practice and Procedure §§1368, 1369 (1973). Additionally, Defendants Ragland and Gemini cross claimed against Union and McNeal for indemnification, court costs and attorney's fees. Union moved that the cross claim be dismissed for failure to state a claim.

The Virginia Right to Work law is not incorporated by the federal Assimilative Crimes Act because the policy of the Virginia statute conflicts with federal law. The Assimilative Crimes Act fills gaps in the federal criminal code. State laws are not applied to federal enclaves through the Assimilative Crimes Act if the state law provision would conflict with existant federal law or policy. Williams v. United States, 327 U.S. 711, 717-24 (1946); Stewart & Co. v. Sadrakula, 309 U.S. 94, 100 (1940); United States v. Warne, 190 F.Supp.

645, 657-58 (N.D. Calif. 1960); Nash v. Air Terminal Services, 85 F.Supp. 545, 548 (E.D. Va. 1949); Air Terminal Services, Inc. v. Rentzet et. al., 81 F.Supp. 611 (E.D. Va. 1949); Note, Federal Assimilative Crimes Act, 70 Harv. L. Rev. 685 (1957); cf. 21 Am. Jur. 2d Criminal Law §395 (1965); see United States v. Press Publishing Co., 219 U.S. 1, 9 (1911). Such a conflict does arise in the instant case. Virginia law expressly prohibits union shop agreements while federal law expressly permits union shop agreements.[1] Compare Va. Code Ann. §40.1-58 with 29 U.S.C. §158(a)(3). In view of the foregoing it is unnecessary for this Court to consider whether *vel non* the Virginia Right to Work Law would be incorporated by the Assimilative Crimes

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[1] Section 8(a)(3) of the National Labor Relations Act has been interpreted to permit the requiring of paying union dues. NLRB v. General Motors Corp., 373 U.S. 734, 740-41, 53 LRRM 2313 (1963); Radio Officers' Union v. NLRB, 347 U.S. 17, 40-41, 33 LRRM 2417 (1954); NLRB v. Hershey Foods Corp., 513 F.2d 1083, 1085, 89 LRRM 2126 (9th Cir. 1975); McDowell v. Clement Bros. Co., 260 F.Supp. 817, 819, 63 LRRM 2432 (N.D. Ga. 1966). This form of union agreement is frequently labeled an "agency shop agreement". See 2 J. Jenkins, Labor Law §4.9 (1969).

Section 8(a)(3) of the National Labor Relations Act provides in pertinent part that "... nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization ... to require as a condition of employment membership therein ...". By virtue of section 164(b) of the Labor-Management Relations Act, 29 U.S.C. §164(b), states may enact right-to-work laws. This permission to the states, however, does not soften application of section 8(a)(3) of the National Labor Relations Act in areas under exclusive federal jurisdiction.

Act in the absence of conflicting federal policy. It is also, *a fortiori*, unnecessary to decide whether any implied civil cause of action arise under the federal Assimilative Crimes Act.

Plaintiff's attack on the constitutionality of Section 8(a)(3), which explicitly permits union shop agreements requiring union membership as a condition of continued employment, is without merit insofar as it requires payment of dues and union fees. In Railway Employees' Department, AFL v. Hanson, 351 U.S. 225, 38 LRRM 2099 (1956), the Supreme Court upheld union security agreements requiring payment of dues, initiation fees and assessments pursuant to congressional authorization in the Railway Labor Act against attacks leveled under the First and Fifth Amendments. The Court, however, carefully limited its holding, stating:

> If the exaction of union dues, initiation fees, or assessments is used as a cover for forcing ideological uniformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. . . . We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate either the First or the Fifth Amendments. Id. at 238, 38 LRRM at 2104.

Subsequent court decisions have followed the principle laid down in Hanson, supra, thereby upholding union security agreements requiring payment of dues and initiation fees. Buckley v. American Fed. of Television and Radio Artists, 496 F.2d 305, 86 LRRM 2103 (2d Cir. 1974), cert. denied, 419 U.S. 1093, 87 LRRM 3293 (1973), rehearing denied, 420 U.S. 926 (1975); Linscott v. Millers Falls Co., 440 F.2d 14, 76 LRRM 2994 (1st Cir. 1971), cert. denied, 400 U.S. 1001, 76

LRRM 2160 (1971); see Haggard, A Clarification of the Types of Union Security Agreements Affirmatively Permitted by Federal Statutes, 5 Rutgers-Camden L.J. 418 (1974), passim.

Although courts have expressly upheld those agreements that require the payment of initiation fees and dues in support of the collective bargaining efforts of the union, the Supreme Court has never discussed the constitutionality of union security agreements that condition continuing employment on full union membership, which would entail not only payment of union dues and fees, but also adherence to other union rules governing employee conduct with respect to management and the union organization itself. Agreements of this sort, however, are arguably violative of the National Labor Relations Act. See NLRB v. Hershey Foods Corp., 513 F.2d 1083, 89 LRRM 2126 (9th Cir. 1975) (under valid union security agreement, employee who tendered the dues and fees uniformly required of members could not be compelled to become a full-fledged union member in order to be protected from discharge); Compulsory Union Membership under the National Labor Relations Act–Is Hershey Foods Corp. the End of the Road?, 23 W & L L. Rev. 205 (1976), passim.

It is unassailable that this Court possesses jurisdiction to decide the constitutionality of union shop agreements requiring only payment of dues and fees because such agreements are uncontestably authorized by the terms of the statute and therefore may not arguably constitute an unfair labor practice. It may also decide the applicability of the Virginia Right to Work Law to federal enclaves. Cf. Oil Chemical and Atomic Workers v. Mobil Oil Corp., 426 U.S. 407, 96 S.Ct. 2140, 92

LRRM 2737 (1976). But his Court must defer to the National Labor Relations Board (hereinafter NLRB) for a determination of whether or not the requirement that employees maintain union membership in good standing in addition to paying dues and fees complies with the standards of section 8 of the National Labor Relations Act, 28 U.S.C. §158. Under the preemption doctrine, federal courts must defer to the exclusive competence of the NLRB when unfair labor practices are arguably alleged. Amalgamated Ass'n of Street, Elec. Ry. and Motor Coach Employees v. Lockridge, 403 U.S. 274, 77 LRRM 2501 (1971); San Diego Buildings Trades Council v. Garman, 359 U.S. 236, 245, 43 LRRM 2838 (1959); see Garner v. Teamsters Union, 346 U.S. 485, 490-91, 33 LRRM 2218 (1953). See also Connell v. U.S. Steel Corp., 516 F.2d 401, 89 LRRM 3089 (5th Cir. 1975).

Taking the facts in the light most favorable to Plaintiffs, this Court rules that as a matter of law the Virginia Right to Work Law is not assimilated into federal law by the Federal Assimilative Crimes Act and therefore does not apply to federal enclaves. It is further recognized by this Court that as a matter of law it is constitutionally permissable to require payment of union dues as a condition of continued employment. As to whether the specific agreement between Gemini and Union comports with statutory requirements of fair labor practice is a question for consideration by the NLRB. In view of the findings of this Court, Ragland's and Gemini's cross claim for indemnification and related relief is inappropriate.

Accordingly, Defendants' motion for judgment on the pleadings is GRANTED as to the constitutionality of the requirement of union membership and as to the application of the Assimilative Crimes Act, 18 U.S.C. §13.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-793

PEGGIE ANN KING, BARBARA JENKINS, AND IRENE COMBS,

Petitioners,

v.

PUBLIC SERVICE EMPLOYEES LOCAL UNION 572 OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, GEMINI FOOD SERVICES, INC., ERNEST MCNEAL, AND SIDNEY C. RAGLAND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is reported at 438 F.Supp. 964. The opinion of the Fourth Circuit is reported at 562 F.2d 297. The district court granted a motion for judgment on the pleadings. The court of appeals affirmed. The opinions of the district court and the court of appeals appear in the Appendix to the Petition, pp. 7a *et. seq.*

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the Federal Assimilative Crimes Act, 18 U.S.C. § 13, incorporates the Virginia "right-to-work" laws into federal law which is applicable on federal enclaves subject to exclusive federal legislative jurisdiction.

STATUTES INVOLVED

The statutes involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

Solely for the purposes of respondent union's Opposition to the Petition For a Writ of Certiorari in this case, the following facts may be assumed as true:

The respondent employer is engaged in food service and related business activities as a federal government contractor at Fort Monroe, Virginia. Fort Monroe is a federal enclave subject to exclusive federal legislative jurisdiction within the meaning of Article I, § 8, Clause 17, of the United States Constitution [1] and is within the coverage of the Federal Assimilative Crimes Act, 18 U.S.C. § 13.[2]

Since on or about July 1, 1975, respondent employer has

[1] "The Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States. . . . [A]nd to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings. . . ."

[2] Appendix to the Petition, p. 1a.

been party to a collective bargaining agreement with respondent union which has governed the terms and conditions of employment of employees of the employer, including petitioners. Article III of the agreement provides that all employees coming under the terms of the agreement may be required to join the union within thirty days after employment or within thirty days after the signing of the agreement, whichever is later, as a condition of continued employment.

Since July 1, 1975, the respondent employer has threatened petitioners with loss of employment for failure to join respondent union by paying dues therein in accordance with the provisions of Article III of the aforementioned agreement. As a result of such threatened loss of employment, petitioners, other than petitioner King, paid the requisite dues to respondent union contrary to their personal wishes. In addition, on or about October 17, 1975, respondent employer discharged petitioner King because of her refusal to do likewise.

ARGUMENT

1. *The Decisions of the Courts Below Were Correct*

The District Court for the Eastern District of Virginia held that the Virginia "right-to-work" laws are not incorporated by the Federal Assimilative Crimes Act because the policy of the Virginia statute conflicts with federal law. Appendix to Petition, p. 10a. The United States Court of Appeals for the Fourth Circuit affirmed for the reasons stated in the district court's opinion, Appendix to Petition, p. 8a.

While the Federal Assimilative Crimes Act has served to fill gaps in federal criminal law, it is well settled that it may not be applied so as to establish federal crimes based on state statutes which are contrary to federal policy. *Williams* v. *United States*, 327 U.S. 711, 717-24 (1946); *Stewart*

& Co. v. *Sadrakula,* 309 U.S. 94, 103-104 (1940); *United States* v. *Warne,* 190 F.Supp. 645, 658 (N.D. Cal. 1960); *Air Terminal Services, Inc.* v. *Rentzel,* 81 F.Supp. 611, 612 (E.D. Va. 1949). The legislative and judicial treatment which the union security issue has received since the enactment of the National Labor Relations Act (hereinafter "NLRA") in 1935 makes very evident that there exists a conflict between federal policy and Virginia law which precludes the application of the Virginia "right-to-work" laws to federal enclaves.

In passing Section 8(a)(3) of the NLRA, 29 U.S.C. § 158 (a)(3),[3] Congress legislated in the area of union security by providing "[t]hat nothing in this Act or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein. . . ." In interpreting this provision this Court has said that Section 8(3) of the Wagner Act, the immediate antecedent of Section 8(a)(3), disclaims

> [A] national policy hostile to the closed shop or other forms of union security agreement. This is the obvious inference to be drawn from the choice of the words "nothing in this Act . . . or in any other statute of the United States," and it is confirmed by the legislative history.

Algoma Plywood & Veneer Co. v. *Wisconsin Employment Relations Board,* 336 U.S. 301, 307 (1949).

Even though in 1947 Congress passed Section 14(b) of the NLRA, 29 U.S.C. § 164(b),[4] which expressly authorized the exercise of state power to prohibit union security agreements within the areas of state sovereignty, Congress as a

[3] Appendix to Petition, p. 2a.

[4] Appendix to Petition, p. 3a.

matter of federal policy has continued to favor the union shop.[5]

However, federal policy does much more than merely authorize the union shop. Under Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), employers are under a statutory obligation to bargain concerning union security. *NLRB* v. *General Motors Corp.,* 373 U.S. 734 (1963); *NLRB* v. *Andrew Jergens Co.,* 175 F.2d 130 (9th Cir. 1949), *cert. denied,* 338 U.S. 827 (1949). Section 8(a)(3) of the NLRA has been interpreted to permit the requiring of paying union dues. *NLRB* v. *General Motors Corp., supra; Radio Officers Union* v. *NLRB,* 347 U.S. 17, 40-41 (1954); *NLRB* v. *Hershey Food Corp.,* 513 F.2d 1083, 1085 (9th Cir. 1975); *McDowell* v. *Clement Bros. Co.,* 260 F.Supp. 817, 819 (N.D. Ga. 1966). In addition, under Section 301(a) of the NLRA, 29 U.S.C. § 185(a), the federal courts are available to parties seeking to enforce union shop agreements. *Modine Mfg. Co.* v. *Grand Lodge,* 216 F.2d 326, 328 (6th Cir. 1954); *Burlesque Artists Ass'n* v. *I. Hirst Enterprises,* 134 F.Supp. 203 (E.D. Pa. 1955); *See Burlesque Artists Ass'n* v. *I. Hirst Enterprises,* 267 F.2d 414 (3rd Cir. 1959).

Hence, it is clear that "Congress [has undertaken] pervasive regulation of union-security agreements," *Retail Clerks Int'l Ass'n* v. *Schermerhorn,* 375 U.S. 96, 100 (1963), and that such regulation runs directly counter to the thrust of the Virginia "right-to-work" laws which prohibit union security agreements in their entirety.

However, even beyond the rationale of the court of appeals and district court, the language and legislative history of Section 8(a)(3) of the NLRA, as amended, preclude assimilation of the Virginia "right-to-work" laws into federal law. In Section 8(a)(3) Congress prohibited reliance

[5] See 1951 amendments to the Railway Labor Act, 45 U.S.C. § 152, par. 11; 1959 amendments to NLRA, Section 8(f), 29 U.S.C. § 158(f).

upon any other federal statute to undermine the normal application of Section 8(a)(3) which authorizes union shop agreements. Section 8(a)(3) declares that no language "in any other statute of the United States" shall preclude the making of union shop agreements. This legislative command is both clear and unequivocal.

The legislative history of Section 8(3) of the Wagner Act of 1935 (NLRA), the immediate antecedent of Section 8(a)(3), makes eminently clear that Congress deliberately inserted the foregoing language to expressly preclude the possibility that courts or governmental agencies might interpret the provisions of other federal laws, such as the Federal Assimilative Crimes Act, so as to frustrate the policy of permitting union shop agreements.[6]

Therefore, the conclusion is abundantly clear that Section 8(a)(3) stands as an absolute bar to any effort to rely upon the Federal Assimilative Crimes Act as a device to frustrate the federal policy which authorizes the negotiation of union shop agreements.

2. *There is No Conflict Among the Circuits*

The United States Court of Appeals for the Fourth Circuit is the first and only circuit court to reach the issue presented herein. Furthermore, the only other reported decisions on the issue agree with the Fourth Circuit's ruling. *See Cooper* v. *General Dynamics*, 378 F.Supp. 1258 (N.D. Tex. 1974), *rev'd in part on other grounds*, 533 F.2d 163 (5th Cir. 1976), *cert. denied sub nom. International Association of Machinists* v. *Hopkins*, 45 U.S.L.W. 3840 (1977); *Vincent* v. *General Dynamics Corp.*, 427 F.Supp. 786 (N.D. Tex. 1977).

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[6] *See 1 Legislative History of the National Labor Relations Act*, pp. 16, 1319 and 1322, 73d Cong., 2d Sess. (G.P.O. 1935); *2 Legislative History of the National Labor Relations Act*, pp. 2290, 2321-2325, and 3069, 73d Cong., 2d Sess. (G.P.O. 1935).

3. *The Decision Below Does Not Conflict With any Decision of this Court*

Our argument above and the Memorandum Opinion of the district court makes abundantly clear that not only does the court of appeals decision not conflict with any decision of this Court but that the case law in this Court mandates the decision by the court of appeals. Petitioners have attempted to create an illusion of conflict by relying on *dicta* in various decisions of this Court. However, the cases cited by petitioners leave no doubt that petitioners' alleged conflicts have simply been manufactured for the purposes of their Petition and are an insufficient ground for granting a Writ of Certiorari.

Petitioners first claim that the court of appeals decision conflicts with this Court's decision in *Hancock* v. *Train*, 426 U.S. 167 (1976). Not only is there no conflict between the decisions but, in fact, the *Hancock* decision supports the holding of the court of appeals. In *Hancock*, this Court held that state law applies to federal installations and activities only where there is a "clear and unambiguous" congressional mandate which authorizes state regulation. *Id.*, at 179. Not only did the court of appeals and the district court find no such mandate, but the court of appeals found that, in fact, the Virginia "right-to-work" laws were in conflict with the federal law. Appendix to Petition, pp. 8a and 11a.

Petitioners also claim that the decision below conflicts with this Court's decision in *Howard* v. *Commissioners of Sinking Fund*, 344 U.S. 624 (1953). In *Howard*, this Court held that even though a municipality could annex a federal enclave, exclusive jurisdiction over the enclave remains with the federal government unless modified by a federal statute. In *Howard*, this Court found that there was a federal statute—the Buck Act, 4 U.S.C. §§ 105-110—which permitted a municipality to levy a license fee on employees working on a federal enclave. However, unlike the Buck Act, Section 14(b) of NLRA does not modify federal jurisdiction. It

simply permits states to legislate their own policies as to union shop agreements in their own jurisdictions free of federal pre-emption. Thus, there is no conflict between *Howard* and the decision of the court of appeals below.

Next petitioners argue that the decision below is not in conformity with this Court's decision in *United States* v. *Sharpnack,* 355 U.S. 286 (1958). There this Court held that the Federal Assimilative Crimes Act, as amended in 1948, was constitutional insofar as it made applicable to a federal enclave a subsequently enacted criminal law of the state in which the enclave was situated. The court of appeals here did not question the constitutionality of the Federal Assimilative Crimes Act but rather held that Virginia's "right-to-work" laws were not incorporated by the Federal Assimilative Crimes Act because the policy of the Virginia statute conflicts with federal law. Appendix to Petition, p. 10a. Thus any conflict between the instant case and *Sharpnack* is simply illusory.

Petitioners also argue that this Court's decision in *Oil, Chemical & Atomic Workers* v. *Mobil Oil Corp.,* 426 U.S. 407 (1976), dictates that the Virginia "right-to-work" laws be applied to any employee working within the boundaries of the State of Virginia and thus conflicts with the court of appeals decision. However, this Court's holding in *Mobil Oil* was simply that "§ 14(b) [of the Taft-Hartley Act] does not allow enforcement of right-to-work laws with regard to an employment relationship whose principal job situs is outside of a state having such laws." 426 U.S. at 418. The question in *Mobil Oil* was whether Texas' "right-to-work" law should be applied to seamen whose predominate job situs was at sea outside the territorial jurisdiction of Texas. The case did not attempt to deal with the Plenary Powers Clause of the Constitution[7] which gives Congress exclusive legislative authority over federal enclaves pur-

[7] Art. I, § 8, cl. 17. Fn. 1, *supra.*

chased with the consent of a state. Thus Virginia's "right-to-work" laws may be applied to a federal enclave only through incorporation by the Federal Assimilative Crimes Act. *See, People of Puerto Rico* v. *Shell Co.,* 302 U.S. 253, 266 (1937). However, the court of appeals below ruled that the Federal Assimilative Crimes Act does not incorporate the Virginia statute. Therefore, there is no conflict between the decisions.

Finally, petitioners contend that the decision below conflicts with this Court's decision in *Algoma Plywood and Veneer Company* v. *Wisconsin Employment Relations Board, supra,* and *Retail Clerks Int'l. Assn'n.* v. *Schermerhorn,* 373 U.S. 746 (1963), *reargued,* 375 U.S. 96 (1963). In those cases, this Court held that under the NLRA states are free to regulate union-security and agency-shop agreements as they see fit. Neither respondent nor the courts below take issue with that holding. However, this Court's holdings in *Algoma Plywood* and *Schermerhorn* are inapposite where the state is without jurisdiction. *See Oil, Chemical & Atomic Workers* v. *Mobil Oil, supra,* 426 U.S. at 420. Therefore, in the instant case which involves a federal enclave upon which the state has no power to legislate, the *Algoma Plywood* and *Schermerhorn* decisions do not apply and thus there is no meaningful conflict between those decisions and the decision of the court of appeals below.

CONCLUSION

For the reasons set forth herein, respondent prays that the Petition for a Writ of Certiorari filed herein be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Brief in Opposition were served by first-class mail, postage prepaid, this 25th day of January, 1978, upon the following:

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